The Supreme Court of the United States

October Term, 1951

No.

UNITED TRUCK LINES, INC.,
Petitioner,
vs.
INTERSTATE COMMERCE COMMISSION

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of Certiorari issue to review the decree of the Court of Appeals for the Ninth Circuit entered May 31, 1951 affirming a decree of the District Court of the United States for the Eastern District of Washington, Northern Division, entered September 20, 1950.

OPINIONS BELOW

The Opinion of the Court of Appeals filed May 31, 1951 is contained in the Record at page 64. The opinion of the District Court filed September 20, 1950 is not yet reported and for convenience is printed in an appendix to this petition and brief.

BASIS OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C.A., Section 1254, 62 Stat. 928.

Application for stay of mandate pending application in this Court for writ of certiorari was made June 27, 1951 and order staying the mandate pending the application for writ of certiorari in this Court was entered July 2, 1951.

QUESTIONS PRESENTED

In the United States District Court for the Eastern District of Washington, Northern Division, the Interstate Commerce Commission, herein referred to as

the "Commission," brought suit to enjoin Petitioner, a common carrier over highways by motor truck, from operating its vehicles between Boise, Idaho and Pasco, Washington over U. S. Highway No. 30. By its answer to the Commission's bill of complaint Petitioner alleged its authority granted by the Commission so to transport freight and by its reply the Commission specifically denied the existence of such authority.

In this state of the pleadings, without hearing the facts supporting Petitioner's allegation, without even an affidavit in support of the Commission's position, the Commission moved for summary judgment which was granted by the trial court and its act affirmed in the Court of Appeals.

This gives rise to two queries:

1. May the lower courts deny Petitioner a hearing on an unresolved issue of fact which is the crucial one controlling the decision in the case?

2. By refusing to permit the defendant to support its allegation that it had authority, the effect of which is to revoke a substantial portion of the Certificate of Public Convenience and Necessity of this Petitioner, may the judgments of the lower courts destroy or materially impair the value of such certificate and thereby deprive Petitioner of its constitutional right to protection thereof?

SUMMARY STATEMENT

It is admitted by the Pleadings (R. 38) that Petitioner holds a Certificate of Public Convenience and Necessity (MC 7746) issued by the Commission to Petitioner as a highway common carrier of freight which contains a number of grants to Petitioner covering a network of principal highways and cities of the states of Oregon, Washington and Idaho. By one grant of this certificate (R. 16) (herein referred to as the "Seattle Route") Petitioner has the right to haul freight between Spokane and Seattle-Tacoma in Washington. By a second grant (R. 17) (herein referred to as the "Portland Route") it has the right to haul freight between Spokane, Washington and Portland, Oregon. By a third (R. 22) (herein referred to as the "Boise Route") it has the right to haul freight between Spokane, Washington and Boise, Idaho, using U. S. Highway No. 30 between Fruitland, Idaho and Boise, Idaho. By these three routes Petitioner is authorized to haul freight to and from its headquarters in Spokane, Washington to all of the chief centers of population of the three states comprising the Pacific Northwest.

By its latest grant (R. 27) issued April 19, 1949 (herein referred to as the "Off-Route Grant") Petitioner has the right to give like motor freight service "to and from points in Grant, Lincoln, Franklin, Adams and Benton counties, Washington, as *intermediate* and *off-route* points in connection with said carrier's *otherwise authorized regular* route operations." (Emphasis supplied.)

In explanation of Petitioner's Off-Route Grant, Lincoln and Grant counties are the first and second counties to the west of Spokane county along its Seattle Route, while Adams, Franklin and Benton counties are the counties southwest of Spokane county along its Portland Route extending from Spokane to the south boundary of Washington and including Pasco, Washington which is on the boundary between Franklin and Benton counties (R. 66).

Thus, by the Off-Route Grant the towns along its Seattle Route in Lincoln and Grant counties are "off-route" to the towns on its adjacent Portland Route and enable motor freight from Portland to cross over on intermediate highways from the Portland Route to the towns along its Seattle Route in these two counties. Thereby motor freight, instead of moving all the way from Portland to Spokane on its Portland Route and then backtracking on its Seattle Route to its destination, is enabled to use intermediate highways to cross over from the Portland Route to the Seattle Route, substantially shortening the haul and reducing operating costs. Return hauls from these points in Lincoln and Grant counties to Portland also use these intermediate routes with equal economy.

Similarly, by the Off-Route Grant the towns along the Portland Route in the three counties of Adams, Franklin and Benton are "off-route" to the towns on the adjacent Seattle and Boise Routes and enable

motor freight from Boise or from Seattle to cross over on like intermediate highways from their counties, with like economies in haulage and cost. Here again return hauls also use the same "cross-over" routes. For the convenience of the Court, Petitioner inserts on pp. 8 and 9 of this brief a reproduction of so much of the official AAA Road Map as is required to show these several routes.

With relation to these four routes outlined above, Pasco, the western terminal of the haul here challenged, is an intermediate point on the Portland Route and it is undisputed that Petitioner has the right granted to it by its Boise and Portland Routes to haul freight from Boise, Idaho to Spokane, Washington and thence to Pasco, Washington and return (R. 22, 17, 38).

Unable by this circuitous route to haul freight from Pasco to Boise and return with adequate economy, Petitioner took advantage of its Off-Route Grant to use Pasco as an "off-route" point to its operations on its Boise Route and, being on U. S. Highway No. 30 from Boise to Fruitland, Idaho, it continued west on U. S. Highway 30 and thence to Pasco and return. Of its various "off-route" operations this one alone has been challenged by the Commission in this litigation.

In bringing this suit the Commission ignored the existence of Petitioner's Off-Route Grant and contented itself with alleging that from July 1, 1949 to date of filing the complaint Petitioner as a common

carrier had been engaged in hauling freight via this U. S. Highway 30 from Boise to Pasco without a Certificate of Public Convenience and Necessity and without authority issued by the Commission (R. 3-6).

To meet this complaint Petitioner set up in its answer (R. 11-36) its large number of grants from the Commission, including the three grants that are here stated and that are involved with its Off-Route Grant, and in paragraph 4 of its affirmative defense (R. 12) pleaded that Pasco "is an off-route point to defendant's otherwise authorized operations."

By its reply the Commission specifically denied "that said Pasco is an off-route point to defendant's authorized operations between Boise, Idaho and Spokane, Washington" (R. 39).

With this issue of fact before the Court the Commission moved for summary judgment (R. 47). In the then state of the pleadings, without taking testimony and with this unresolved issue of fact before it, the trial court "determined that there was no genuine issue of any material fact" and issued its injunction permanently restraining Petitioner from transporting property for compensation in interstate commerce by motor vehicle on public highways designated as U. S. Highway No. 30 between Boise, Idaho and Pasco, Washington "except as authorized by appellant's Certificate of Public Convenience and Necessity" (R. 50-51).

SPECIFICATIONS OF ERROR

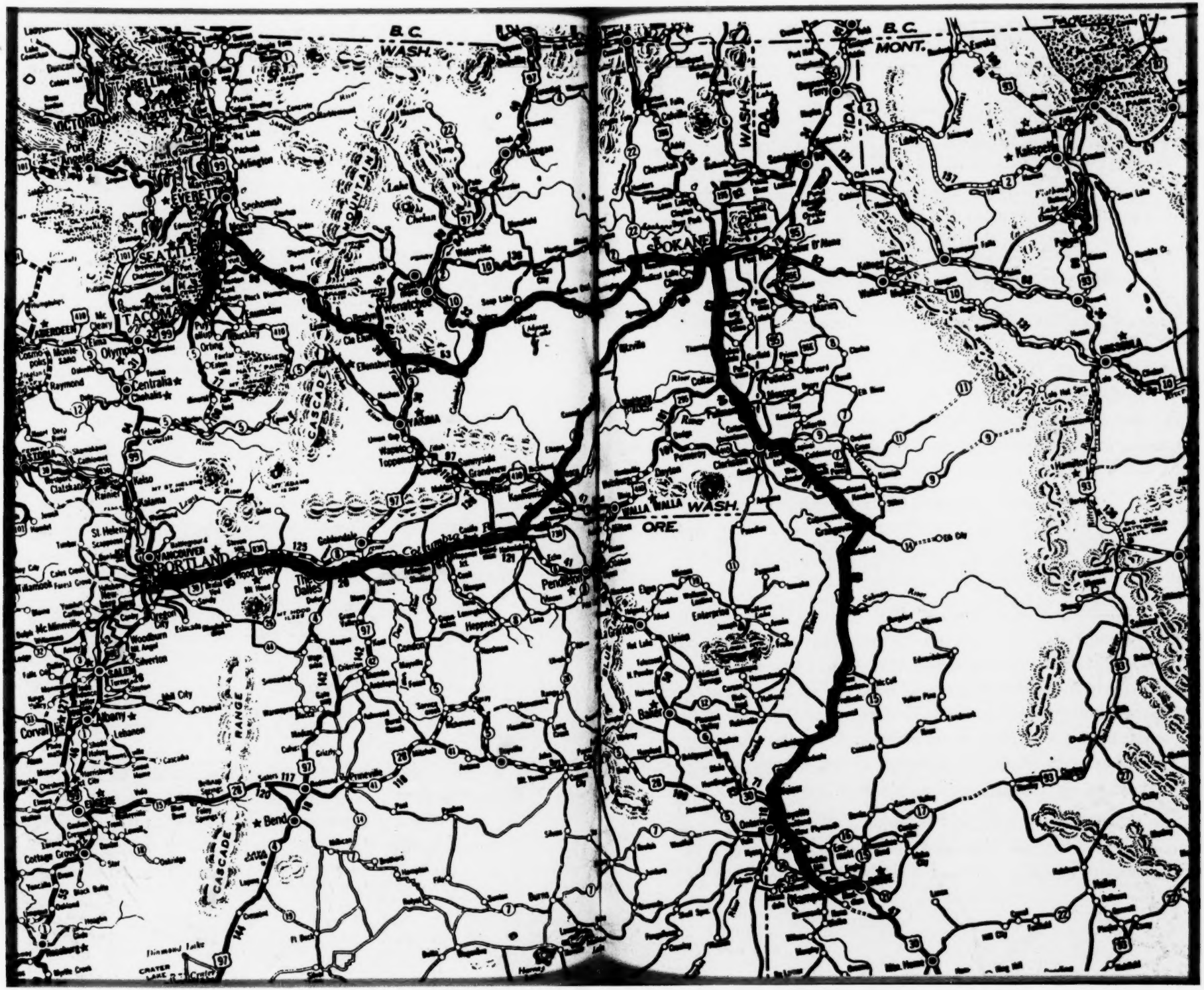
1. The courts below erred in determining, on a motion for summary judgment, that Petitioner has no right to use Pasco as an "off-route" point on shipments to and from Boise, Idaho, when the unresolved issue of fact presented by the pleadings as to whether it is or is not an off-route point was pending before the court.

2. The courts below erred in assuming that the Commission had placed a definite interpretation on the phrase "off-route point" and in concluding that the "general practice" of the Commission supported a "restricted interpretation" of Petitioner's Certificate of Public Convenience and Necessity.

3. The courts below erred in deciding as a matter of law that a restricted meaning should be given to the phrase "off-route points" as used in the Commission's Off-Route Grant to Petitioner.

4. The courts below erred in denying to Petitioner a hearing either before the Commission or the courts as to the meaning of the phrase "off-route points" in the counties of the various surrounding grants over parallel highways made by the Commission to Petitioner.

5. The courts below erred in enjoining Petitioner from transporting freight from Boise to Pasco by the most direct route as contemplated by its Off-Route Grant. Thereby the courts below have unwarrantedly limited the rights of Petitioner in its Off-Route Grant,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Corvallis
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Cottage Grove
Woodburn
Hillsboro
Hood River
Bend
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Crater Lake
Diamond Lake
CASCADE RANGE
SPOKANE
Coeur d'Alene
Kellogg
Missoula
Walla Walla
La Grande
Baker
Ontario
Boise
Pocatello
Idaho Falls
Lewiston
Clarkston
Grangeville
Moscow
Pullman
Colfax
Ritzville
Wenatchee
Ellensburg
Cle Elum
Kittitas
Toppenish
Goldendale
Columbia R.
Yakima R.
Snoqualmie
Monroe
Arlington
Darrington
Sedro Woolley
Mt. Vernon
Lynden
Blaine
Aberdeen
Raymond
Elma
Shelton
Olympic Nat. Park
Mt. Rainier Nat. Park
Grand Coulee Dam
Lake Roosevelt
Priest Lake
Sandpoint
Bonners Ferry
Glacier Nat. Park
Flathead Lake
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Whitefish
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Owyhee R.
Malheur R.
Deschutes R.
John Day R.
Willamette R.
Umpqua R.
Rogue R.
Klamath R.
Pend Oreille R.
Kootenai R.
Flathead R.
Clark Fork R.
Bitterroot R.
Big Hole R.
Jefferson R.
Missouri R.
Yellowstone R.
Gallatin R.
Madison R.
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Powder R.
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Little Missouri R.
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Moreau R.
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Pierre
Fort Pierre
Chamberlain
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Watertown
Sioux Falls
Yankton
Vermillion
Sioux City
Omaha
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Falls City
Hastings
Kearney
Grand Island
North Platte
Ogallala
Scottsbluff
Alliance
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Rushville
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Hay Springs
Crawford
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Rapid City
Deadwood
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Spearfish
Sturgis
Belle Fourche
Newcastle
Hot Springs
Edgemont
Custer
Hill City
Keystone
Mt. Rushmore Nat. Memorial
Wind Cave Nat. Park
Jewel Cave Nat. Monument
Custer State Park
Black Hills
Badlands Nat. Monument
Wall
Interior
Kadoka
Philip
Midland
Hayes
Timber Lake
Mobridge
Eagle Butte
Lemmon
McIntosh
Bowman
Hettinger
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Miles City
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Billings
Laurel
Columbus
Red Lodge
Cooke City
Gardiner
Livingston
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Anaconda
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Missoula
Hamilton
Stevensville
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Kooskia
Grangeville
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Lewiston
Clarkston
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Othello
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Davenport
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Wallace
Mullan
Pend Oreille Lake
Priest River
Newport
Metaline Falls
Colville
Kettle Falls
Republic
Curlew
Tonasket
Oroville
Omak
Okanogan
Winthrop
Mazama
Twisp
Chelan
Entiat
Leavenworth
Cashmere
Peshastin
Ellensburg
Cle Elum
Roslyn
Kittitas
Toppenish
Goldendale
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White Salmon
Hood River
The Dalles
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Lassen Volcanic Nat. Park
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Portola
Reno
Carson City
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Winnemucca
Battle Mountain
Austin
Eureka
Ely
Tonopah
Goldfield
Beatty
Las Vegas
Boulder City
Hoover Dam
Lake Mead
Overton
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St. George
Cedar City
Parowan
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Bryce Canyon Nat. Park
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Zion Nat. Park
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La Verkin
Virgin
Rockville
Springdale
Orderville
Mt. Carmel
Glendale
Hatch
Panguitch Lake
Navajo Lake
Duck Creek
Kanarraville
Enterprise
Modena
Minersville
Beaver
Milford
Delta
Fillmore
Nephi
Spanish Fork
Provo
Orem
Lehi
American Fork
Salt Lake City
Bountiful
Ogden
Brigham City
Tremonton
Garland
Honeyville
Corinne
Wellsville
Logan
Smithfield
Preston
Malad City
Downey
Arimo
Inkom
Pocatello
Chubbuck
Blackfoot
Shelley
Idaho Falls
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Rexburg
Sugar City
St. Anthony
Ashton
Island Park
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West Yellowstone
Henrys Lake
Targhee Pass
Dubois
Spencer
Salmon
Challis
Mackay
Arco
Craters of the Moon Nat. Monument
Carey
Hailey
Ketchum
Sun Valley
Stanley
Lowman
Idaho City
Boise
Nampa
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Cambridge
New Meadows
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Cascade
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Fort Rock
Christmas Lake
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attached to and part of its Certificate of Public Convenience and Necessity, and have materially impaired its value. Since these rights are property of value and entitled to constitutional protection, the judgment of the lower court violates the Fifteenth Amendment to the Constitution of the United States.

REASON FOR GRANTING THE PETITION

From the foregoing summary statement it is manifest that this case turns on the question whether Pasco, on the Portland Route of Petitioner, is an "off-route point" with reference to Petitioner's Boise Route which parallels its Portland Route. It is admitted by the Commission in paragraph 5 of its reply that the route used by Petitioner is

> "the most feasible and practical route for a motor carrier to traverse from Boise, Idaho to and from * * * Pasco as an intermediate and off-route point in connection with defendant's (Petitioner's) regular route operations." (R. 39)

Petitioner having pleaded that Pasco was "such an off-route point" and the Commission having denied it, Petitioner was plainly entitled to have this question of fact determined at a trial where it could offer evidence in support of its assertion of the fact. The denial by the trial court, affirmed by the Court of Appeals, of Petitioner's right to offer facts in support of its allegation is manifestly error.

The precise question whether summary judgment may be entered against a defendant, while an important question of fact remains undetermined, re-

ceived a decision exactly contrary to the decision of the Court of Appeals in this case in the U. S. Court of Appeals for the District of Columbia, *Dewey v. Clark,* 180 F.2d 766. Indeed, this U. S. Supreme Court has heretofore issued its writ of certiorari to correct the error of the Fifth Circuit Court in improvidently granting summary judgment in like circumstances with the case at bar, *Sartor v. Arkansas Gas Corp.,* 321 U. S. 620.

ARGUMENT

I.

Is there an unresolved issue of fact, disregarded by entry of summary judgment under Rule 56?

(Specification of Errors 1 and 2)

The summary statement discloses an issue of fact, crucial to the determination of the rights of Petitioner, squarely raised by Petitioner's answer and the Commission's reply, as to whether or not Pasco is an "off-route" point to Petitioner's authorized Boise Route.

The trial court's opinion (App. p. 22) frankly concedes that Petitioner's interpretation that its rights under its grant entitled it to consider Pasco as an "off-route" point "has substantial merit" and that this is "the broad literal meaning" of the language. The opinion of the Court of Appeals (R. 66) states that "The Commission appears to have no formal rule or regulation defining the term 'off-route' point."

Nevertheless, both the trial and appellate courts construed three decisions of the Commission in cases arising in other regions under quite different facts as indicating that the Commission has placed a restricted interpretation on the words "off-route point." On the strength of these cases the lower courts rejected the issue of fact tendered by Petitioner and emphasized by the Commission's denial thereof. In these three cases relied on by the Commission and by the lower courts (*Dixie Freight Lines, Inc.,* 29 M.C.C. 406; *System Arizona Express Service, Inc.,* 4 M.C.C. 129, 131; *Los Angeles-Seattle M. Express, Inc.,* 24 M.C.C. 141, 135) the language relied upon that comes closest to any justification of the lower court's decisions is as follows: In the Dixie case, supra, the Commission stated:

> "An off-route point is one *usually* served by line-haul equipment making a short side trip and returning as soon as possible to the regular route or schedule," (Emphasis supplied.)

and in the Arizona case the Commission said:

> ". . . applicant's manager suggested that such (off-route) service would relate to hauls of 150 miles from regular routes. Obviously, such service is not off-route service as that term *ordinarily* is used . . ." (Emphasis supplied.)

The court will note in each case the use of the qualifying terms "usually" and "ordinarily."

In a case later than any of these three cases the Commission after citing the Dixie case used still another and a more liberal definition of an off-route

point to fit the particular facts before it. In *George H. Blewett et al,* M.C. F-1521, the Commission said:

> "In our opinion service to and from a given off-route point contemplates the use of the most direct available highway between the off-route point and the nearest point on the regular route, which in this case is Jackson."

Accordingly, the Commission confirmed the carrier in its contention that Vicksburg was an off-route point to Jackson in connection with the carrier's regular route operations between Jackson and New Orleans.

In this case Petitioner accordingly brought itself within the terms of this latter definition of an off-route point when it pleaded (par. V, answer, R. 13) that its route challenged by the Commission

> "is the shortest, most feasible and practical route for a motor carrier to traverse from Boise, Idaho to and from . . . Pasco, Washington as an intermediate and off-route point in connection with defendant's regular-route operations."

In its reply (R. 39) the Commission admitted this allegation, merely pleading that

> "such economic considerations are immaterial and irrelevant;"

this, in spite of the fact that these so-called "economic considerations" had recently been used by the Commission in the Blewett case, supra, in ascertaining what is "an off-route point."

Let it be granted that the Commission has power to define and limit the meaning of the term "off-route points." It is clear from the foregoing cases that it has seen fit not to do so. Evidently it believes, with good reason, that this term must be kept flexible, adapted to the special circumstances of each case.

Under its allegation that Pasco was an "off-route" point to its Boise Route, Petitioner was entitled to show unusual and extraordinary circumstances that entitled it to a much broader application of the term "off-route"—broad enough to include Pasco within the benefit of the term. But for the summary judgment, Petitioner would have been able to show all the other uses of the "Off-Route Grant" made by it, similar to the Boise-Pasco off-route trip, which the Commission, by not challenging, seems to admit are a proper construction of its "Off-Route Grant." The entry of summary judgment also prevented Petitioner from showing the wild and ruggedly mountainous nature of the region resulting in sparse population, the fact that this mountainous terrain compelled a circuitous route from Boise to Pasco—twice the distance by air that separates the Boise Route from Pasco further north—and other related facts, all tending to show that a different interpretation was in order in using the term "off-route points" in this region. Further, the entry of summary judgment prevented Petitioner from showing that it had erected a $60,000 freight terminal at Pasco in reliance on its right so to use the "Off-Route Grant," an expend-

iture rendered worthless to Petitioner by the summary judgment. These and other considerations that could have been shown make it manifest that it was *not* for the court to assume that this is a "usual" and "ordinary" case for the application of a rule restricted to "usual" and "ordinary" cases. Nor, was it for the court to settle, as a question of law, whether Pasco is an "off-route point" when the Commission itself has treated each such issue as one of fact, not governed by any hard and fast rule. It was rather its duty to hear and determine the tendered issue of fact. That the court may not thus refuse to hear and determine a critical issue of fact is clear.

Sarnoff v. Ciaglia, 3 Cir., 165 F.2d 167, 168;
Dewey v. Clark, D.C. Cir., 180 F.2d 766, 772;
Sartor v. Arkansas Gas Corp., 321 U. S. 620, 627.

II.

In thus disregarding a crucial unresolved issue of fact the Court of Appeals has ruled contrary to the holding of other U. S. Court of Appeal.

(Specification of Error 3)

"A litigant has a right to a trial where there is the slightest doubt as to the facts."

Peckham v. Ronrico Corps., 1 Cir., 171 F.2d 653, 657;

Doebler Metal F. Co. v. U. S., 2 Cir., 149 F.2d 130, 135, 136;

Arnstein v. Porter, 2 Cir., 154 F.2d 464, 470-1.

"All doubts as to the existence of a genuine issue of fact must be resolved against the party moving for summary judgment."

Weisser v. Mursan Shoe Corp., 2 Cir., 127 F.2d 344; 145 A.L.R. 467;

Sarnoff v. Ciaglia, 3 Cir., 165 F.2d 167, 168; *Hunter v. Mitchell,* D.C. Cir., 180 F.2d 763, 765.

"Motion for summary judgment * * * should be granted only when it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desired to clarify the application of the law."

Stevens v. Johnson Co., 4 Cir., 181 F.2d 390, 394.

III.

Petitioner has been denied a hearing as to its rights under its "Off-Route Grant" both by the Commission and by the courts.

(Specification of Errors 4 and 5)

Under the general provisions of 49 U.S.C.A., section 304(a)(1,6,7), section 308 and in particular section 304(c) the Commission had plenary power, on complaint of any person or on its own motion, after notice and hearing, to determine the meaning of its use of the phrase "intermediate and off-route points" as applied to Petitioner's "Off-Route Grant," likewise to determine whether this Petitioner had exceeded its rights under this grant. That this is the

usual course in such instances is illustrated by the following decisions to the Commission selected from numerous such instances:

Dixie Freight Lines, Inc., (Extension application) 29 M.C.C. 406;

System Arizona Express Service, Inc., 4 M.C.C. 129, 131;

Los Angeles-Seattle M. Express, Inc., 24 M.C.C. 141, 145;

George H. Blewett, et al., M.C. F-1521.

In the case at bar, however, for reasons best known to the staff of the Motor Carrier Division of the Commission, or some one of them, without holding any such hearing or inquiry, this suit was commenced against Petitioner and the responsibility of determining whether the "Off-Route Grant" to Petitioner by the Commission authorized Petitioner to treat Pasco as an off-route point from Petitioner's Boise Route was shifted from the Commission to the lower courts. The District Court and Court of Appeals in turn have undertaken to shift the responsibility for such determination back to the shoulders of the Commission, not by referring to any specific ruling to which this Petitioner was a party—since there is none—but by trying to spell out a hard and fast determination of meaning from the first three of the cases just cited where only dubious light is to be had as to the view that the Commission "usually" or "ordinarily" takes.

In these cases, plainly, the Commission did not define or determine the meaning of "intermediate and

off-route points" in language even approximating judicial certainty. As was perfectly proper it decided these cases on the specific facts before it in every case and it was careful not to bind itself in other cases that might come before it by the use of such cautionary limitations as are expressed in the words "usually" or "ordinarily."

In thus having to resort to the weight to be given to an interpretation of its grants by the Commission the Court of Appeals cites *Adirondack Transit Lines v. U. S.*, 59 F. Supp. 502 (R. 67). But this case makes just the very point on which we insist. There, the Commission had brought the carrier before it and had determined the meaning of its certificate and the grant made to the carrier under it exactly as we insist it should have done here. Had the Commission determined the precise meaning of its own grant to Petitioner in such a proceeding, upon notice and hearing, we admit that the Petitioner would have been bound by it save for clear error or arbitrary decision.

Unfortunately, neither the Commission nor the courts have granted this Petitioner a hearing. To use language unblessed by judicial usage the Commission has "passed the buck" to the courts and the lower courts in this case have passed it back to the Commission. Thus, Petitioner finds its "Off-Route Grant" materially limited and its rights thereunder impaired without hearing or determination by the Commission which has sent the matter to the courts and without hearing or determination by the courts

which professed to believe that the Commission had adopted a firm rule for its guidance here. As we have seen no such generally applicable rule has been adopted.

Such a certificate and the rights which it confers are property of value and such rights are entitled to constitutional protection:

> *City of Owenboro v. Cumberland T. & T. Co.,* 230 U. S. 58, 33 S.Ct. 988, 57 L.Ed. 1389;
>
> *Frost v. Corporation Commission of Oklahoma,* 278 U. S. 515, 49 S.Ct. 235, 73 L.Ed. 483;
>
> *U. S. v. Seatrain Lines, Inc.,* 329 U. S. 424, 64 S.Ct. 435, 91 L.Ed. 396.

Petitioner respectfully submits that the improvident entry of summary judgment under these circumstances is an error of grave consequences, one that if it goes uncorrected will recur with frenquency constitutes special and important reasons for the correction of the error by this court

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit should be granted.

EDWARD J. REILLY

BENJAMIN H. KIZER
Spokane, Washington
Attorneys for Petitioner.

APPENDIX

HON. SAM M. DRIVER, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

INTERSTATE COMMERCE COMMISSION, *Plaintiff*,

vs.

UNITED TRUCK LINES., INC., a corporation, *Defendant*.

Civil No. 880

RULING OF THE COURT

Spokane, Washington
September 6, 1950

HON. SAM M. DRIVER, United States District Judge.

THE COURT: The regulation of freight and goods by interstate carrier is a very technical, complex business which is primarily, of course, in the hands of the Interstate Commerce Commission, and it seems to me that the general rule should apply here to this situation, that where an order or a certificate has been issued by the Interstate Commerce Commission, that while their interpretation of it is not controlling it is entitled to considerable weight, and here of course the interpretation of this particular certificate 7746 sub 22 is, it seems to me, a reasonable interpretation in view of the general situation that prevails here. In a matter as important and as technical and as difficult as the regulation of interstate motor freight carriers, it doesn't seem to me that the court would be justified in taking the broad literal meaning of language such as that con-

tained in this certificate and applying it contrary to the interpretation placed upon it by the Interstate Commerce Commission.

Of course, if I though the Commission was clearly wrong in interpretation I would not be bound by their interpretation, but here it seems to me it is entitled to weight and it is reasonable. I don't believe that the commission intended and I doubt that there was any plain indication at the time this certificate was applied for and granted, that it would authorize to and from service to Pasco from Boise, Idaho, all the way across the corner of the state of Oregon. I think that the reasonable interpretation and the one that I think was intended is that placed upon it by the Interstate Commerce Commission, that is, that it was intended that the carrier be permitted to serve points within these designated counties from the lines which traverse the counties. That would be the reasonable interpretation and one which would not encroach upon the rights of other certificate holders, and I feel very sure that if there had been any indication or any—certainly if it had been made known that such a broad construction could be placed upon the certificate, there would have been a very serious contest by the holders of the certificate from Boise to Pasco.

At any rate it seems to me that that's the reasonable interpretation to be placed on this certificate, and I think the motion for summary judgment should be granted. However, I feel that the position taken by the carrier in this case was one that was based upon

an interpretation of a certificate that has substantial merit, and I don't believe that there is any indication here that there has been a captious and arbitrary violation or failure to comply with the regulations of the Interstate Commerce Commission, and so I think the carrier should be entitled to a reasonable time to make readjustment so far as its service is concerned, as I presume that probably commitments have been made in the transporting and disposition of equipment which it would be difficult to change within a period of a few days, but it seems to me that two weeks should be a sufficient period in which to enable the carrier to make that readjustment, so that while the motion will be granted, the injunction which will be allowed enjoining the operation of which the Commission has complained in its complaint will become operative as of September 20, 1950, at noon of that day. Make it definite so there won't be any question or misunderstanding, and exception of course will be allowed to the defendant from the Court's ruling.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 227

UNITED TRUCK LINES, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion; a transcript of its oral opinion is reprinted as an appendix to the petition for certiorari. The opinion of the court of appeals (R. 64-68) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1951 (R. 68). The petition for a writ of certiorari was filed on August 6, 1951. The jurisdiction of this Court is invoked under Section 1254 of Title 28 U. S. Code.

QUESTIONS PRESENTED

1. Whether this Court will consider questions raised in a petition for a writ of certiorari which were not raised or passed upon in the court of appeals.

2. If the above question be answered in the affirmative, there is the further question whether, where the facts were not in dispute, and the sole question was whether petitioner's certificates of public convenience and necessity as a motor common carrier authorized operations by petitioner between certain points, it was error for the district court to dispose of the case by summary judgment.

STATUTES INVOLVED

Sections 206(a), 208(a), and 222(b) of the Interstate Commerce Act and pertinent portions of Rule 56 of the Rules of Civil Procedure are set forth in the Appendix, *infra,* pp. 10-12.

STATEMENT

The Interstate Commerce Commission, by complaint (R. 3) filed in the United States District Court for the Eastern District of Washington under the provisions of Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)), sought an injunction to restrain the petitioner, a common carrier by motor vehicle in interstate commerce, from engaging in certain operations alleged to be beyond the scope of its operating authority and in violation of Section 206(a) of the Act (49 U.S.C.

306(a)).[1] Petitioner filed an answer admitting that it had been and was engaged in the questioned operations (Ans., Par. III, R. 10), and proposed to continue therein (Ans., Par. V, R. 10), but alleging that it was lawfully authorized to do so by virtue of certain certificates of public convenience and necessity theretofore issued to it by the Commission, copies of which it attached to its answer as an exhibit (R. 14).

The Commission, proceeding under Rule 56(a) of the Federal Rules of Civil Procedure, thereupon filed a motion (R. 47) for summary judgment in its favor and against petitioner "on the grounds that there is no issue as to any material fact and that plaintiff is entitled to judgment as a matter of law." Following a hearing on the motion, the trial court entered an order and judgment (R. 50-51) enjoining petitioner from engaging in the questioned motor carrier operations.

In its brief on appeal, petitioner specified as error the granting of the injunction and the failure to dismiss the complaint (Appellant's Br. in court of appeals, p. 10). It did not challenge the summary procedure; indeed, petitioner asserted that "The material facts of this case are not in dispute" (*id.*, p. 7). The court of appeals unanimously affirmed the judgment of the district court (R. 64, 68).

---

[1] The particular operations involved were between Pasco, Washington, and Boise, Idaho, mainly over U. S. Highway 30 (Compl., Par. III, R. 4).

ARGUMENT

Although petitioner has not brought the merits of the case before this Court, a brief explanation of the nature of the case will reveal its lack of importance. For present purposes it is sufficient to state that petitioner has two certificates of convenience and necessity, one covering a route running from Spokane in a southerly direction to Boise, and the other a route from Spokane in a southwesterly direction to Portland through Pasco. (See map on pages 8 and 9 of petition.) On April 18, 1949, petitioner also received a certificate authorizing it to perform service to points in certain named counties in the State of Washington (one of which contains Pasco), "as intermediate and off-route points in connection with said carrier's otherwise authorized regular-route operations" (R. 27). Despite lack of any certificate specifically covering that route, petitioner operated trucks on a direct route from Boise to Pasco over Routes 30 and 395,[2] 237 miles [3] of which constituted a diagonal cut-off from the Spokane-Boise route to the Spokane-Portland route. Petitioner sought to justify these operations under the certificate permitting it to serve "off-route points in connection with said carrier's otherwise authorized regular-route operations".

[2] Although the pleadings of both parties, the opinion below and the petition describe the route from Boise to Pasco as over Route 30, the last 65 miles from Pendleton to Pasco are over route 395. See Rand-McNally *Road Atlas* (Supp. to Commercial Atlas), Oregon, p. 75 (1951).

[3] *Ibid.*

The Commission's decisions, summarized in the opinion below (R. 67), properly have construed an "off-route point", in accordance with what would normally be assumed to be the meaning of that expression, as "one served by line-haul equipment making a short side trip and returning as soon as possible to its regular route and schedule".[4] The court below was obviously correct in holding, in accordance with the Commission's construction of its own certificate, that a deviation of over 200 miles one way from the regular route, to a point on another regular route, did not come within the permission to perform ancillary service to off-route points.

1. Petitioner does not seek to bring the merits of the case before this Court, although that was all that was argued in the courts below. Obviously, the question whether Pasco is an off-route point within the meaning of the Commission certificate is not one worthy of review by this Court. Petitioner now challenges in its Questions Presented only the propriety of granting a summary judgment, a point not raised in or decided by the Court of Appeals. It is well settled that this Court will not entertain a petition for certiorari which raises issues not presented in the court below. See *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, and cases cited.

[4] *System Arizona Express Service, Inc.*, 4 M.C.C. 129, 131; *Dixie Freight Lines, Inc. Extension Application*, 29 M.C.C. 406; *Los Angeles-Seattle M. Express, Inc.*, 24 M.C.C. 141, 145; *Knox M. Service, Inc.,—Purchase—J. Bedford M. Service, Inc.*, 36 M.C.C. 713; *Norwalk Truck Line Co.—Purchase—Midwest M. Freight Co.*, 37 M.C.C. 376.

2. Even if petitioner's challenge to the summary procedure used by the trial court could now be considered, that challenge is patently unfounded.

Petitioner contends, first, that the trial court's action in granting the Commission's motion for summary judgment deprived petitioner of a "hearing on an unresolved issue of fact" (Pet. 2). The trial court found (R. 50) "that there was no genuine issue of any material fact," and the petitioner informed the court of appeals that the "material facts of this case are not in dispute" (*supra,* p. 3). It appears, therefore, that petitioner is now trying to create an issue of fact which petitioner itself has admitted does not exist.

The complaint alleged (Pars. III, IV, R. 4) that petitioner was engaged in certain motor carrier operations without authority, in violation of law, to which petitioner replied in substance (Ans., R. 10-13) that it was engaged in operations as alleged but that they were duly authorized by the terms of certain certificates of public convenience and necessity (R. 14) issued by the Commission to petitioner and then in effect. There was no dispute as to the issuance and effectiveness of the certificates, or as to their wording. The Commission admitted those facts when it moved for a summary judgment (R. 47). There was, therefore, no issue of fact to be decided, and the only issue was one of law, that is, whether under its certifi-

cates petitioner was authorized to operate in the manner in which the Commission alleged, and petitioner admitted, it was operating. See *Curacao Trading Co.* v. *Federal Ins. Co.,* 137 F. 2d 911 (C.A. 2), certiorari denied, 321 U.S. 765. This depended on the interpretation to be given the "off-route" clause in the Commission's certificate. The Commission's prior decisions (see n. 4, p. 5, *supra*) show plainly that that clause did not encompass any such large scale deviation as the 474-mile round trip off the approved route undertaken by petitioner.

Petitioner's second contention, that the lower courts, "by refusing to permit the defendant to support its allegation that it had authority," destroyed or materially impaired the value of the certificates held by petitioner and thereby deprived petitioner of its "constitutional right to protection thereof" (Pet. 2), is obviously frivolous. The trial court did not refuse to permit petitioner to support its allegation that it had authority; on the contrary, that court did receive and consider the only evidence (the certificates themselves) which petitioner offered in support of its contention, and petitioner failed to avail itself of its right under Rule 56(c), *infra,* p. 12, to submit opposing affidavits stating any additional facts.

It appears that the evidence petitioner now states it desired to present to the trial court was evidence to the effect that the questioned opera-

tions were justified by reasons of economy, convenience, and necessity.[5] For example, petitioner complains (Pet. 10) that it was denied the right to "offer evidence in support of its assertion of the fact" that the route over which it was operating was "the most feasible and practicable route for a motor carrier to traverse" between Boise, Idaho, and Pasco, Washington. We submit that it would have been highly improper for the trial court to receive and consider such evidence had it been offered. Congress has vested in the Interstate Commerce Commission exclusive authority to grant certificates of public convenience and necessity to motor carriers, including the power to specify in each certificate "the service to be rendered and the routes over which * * * the motor carrier is authorized to operate." Interstate Commerce Act, Section 208(a), 49 U.S.C. 308(a); see *United States* v. *Carolina Freight Carriers Corp.,* 315

[5] The petition for certiorari mistakenly asserts that (p. 10):

> It is admitted by the Commission in paragraph 5 of its reply that the route used by Petitioner is
>
> "the most feasible and practical route for a motor carrier to traverse from Boise, Idaho, to and from * * * Pasco as an intermediate and off-route point in connection with defendant's (Petitioner's) regular route operations." (R. 39.)

Although paragraph V of the Commission's reply (R. 39) admitted that U. S. Highway No. 30 might be "the shortest, most feasible and practical route" between Boise and Pasco, it did not admit that Pasco was an "intermediate and off-route point in connection with defendant's regular route operations". The immediately preceding sentence "denies that said Pasco is an off-route point to defendant's authorized operations between Boise, Idaho, and Spokane, Washington" (*ibid.*).

U.S. 475, 480. It appears, therefore, that the evidence which the petitioner now contends it was denied the right to offer in the trial court was evidence properly admissible only in proceedings in support of an application for an extension of petitioner's certificates.

It is plain that there was no material issue of fact and that the trial court correctly employed the summary judgment procedure.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1951.

APPENDIX

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*, provides in pertinent part as follows:

Sec. 206(a).

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *. [49 U.S.C. 306(a).]

* * * * *

Sec. 208(a).

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate * * *. [49 U.S.C. 308(a).]

Sec. 222(b).

If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character

thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto. [49 U.S.C. 322(b).]

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(a). *Summary Judgment for Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * *

(c). *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

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